



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
STATE HISTORIC PRESERVATION DIVISION
33 SOUTH KING STREET, 6TH FLOOR
HONOLULU, HAWAII 96813

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
CONSERVATION AND
ENVIRONMENTAL AFFAIRS
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
DIVISION
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

AGENDA

MOLOKAI ISLAND BURIAL COUNCIL MEETING

Date: Wednesday, February 21, 1996
Time: 1:30 p.m.
Place: Queen Lili'uokalani Children's Center
Lili'uokalani Trust
Molokai Office
Kalamaula, Molokai

- I. OPENING REMARKS
- II. APPROVAL OF NOVEMBER 21, 1995, MEETING MINUTES
- III. BUSINESS
 - A. Proposed Administrative Rules, "Rules of Practice and Procedure Relating to Burial Sites and Human Remains"
Information: review and discussion of selected sections subject to recent revision.
 - B. Case Updates and Notice of Inadvertent Discovery:
Information/Recommendation: status of ongoing burial cases, completed reinterments, and any necessary follow up by SHPD including Mo'omomi - Nā Iwi Po'o (# 851). In addition, notification of any recent inadvertent discovery of human remains.
- IV. ANNOUNCEMENTS
- V. ADJOURNMENT

LIEUTENANT GOVERNOR'S
OFFICE

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MINUTES MOLOKAI ISLAND BURIAL COUNCIL MEETING

Date: Wednesday, February 21, 1996
Time: 1:30 p.m.
Place: Queen Lili'uokalani Children's Center
Molokai Office
Kalamaula, Molokai

PRESENT:

Council: William Akutagawa Jr.
Anna Goodhue

Staff: Edward Halealoha Ayau Esq., Burials Director
Joann Kapeliela, Facilitator

ABSENT:

Lawrence Aki
Pearl Hodgins (excused)
Noelani Meyer Keliikipi
Randy Fujimori (excused)
Gloria Marks
Henry Ayau Jr. (excused)

I. OPENING REMARKS

Chairperson Billy Akutagawa called the meeting to order at 1:45 p.m.

II. APPROVAL OF THE NOVEMBER 21, 1995, MEETING MINUTES

The approval of the minutes of November 21, 1995, meeting was deferred because of a lack of quorum.

III. BUSINESS

A. Proposed Administrative Rules, "Rules of Practice and Procedure Relating to Burial Sites and Human Remains"

Information: review and discussion of selected sections subject to recent revision.

Akutagawa said that he will call the members who did not show up at today's council meeting and explain to them how important the March 20, 1996, meeting will be because there will be other people attending the meeting from the general public and if they would agree to meet with Ayau prior to the public meeting.

Eddie Ayau went over the revisions of the proposed administrative rules.

Page 300-3, Section 13-300-1 Purpose: Ayau said the last sentence in this section was inserted after the deletion from the first draft of the rules of the section that regulated photography. The Chairman's feeling was that he had concerns about enforcement and felt that it would be unfair to penalize an innocent tourist who took pictures of *iwi*. By including this statement, this would encourage people who want to take these photographs to come to the council or descendants first and find out what their concerns are about taking pictures before it was actually done. This sentence is now Department policy. The staff has been specifically instructed that if we see photographs of *iwi* appear in reports that were taken without prior consultation with the council or lineal descendants, we were instructed to delete the photographs from the report. At the same time, if someone decides not to consult first, there is no penalty against them. This statement basically is unenforceable, but is a policy that the Department is following.

Page 300-9, Section 13-300-4 Government records: This section used to be entitled "Public records". This section addresses the availability of DLNR

records that relate to historic sites and burial sites. It states that all records shall be made available to the public except if a record relates to the location or description of a burial site. Location record and description record is defined here. Location includes information about the island, district, *ahupua'a*, tax map key, address, and a site map where a burial site is identified. Description records includes records that describe the burial features, records that describe human remains including genealogy, or burial goods.

The burial council and the historic places review board has the authority to tell the State that a record that it has which includes description or location of burials should be exempt from public disclosure. When a record is exempt from disclosure, we are also referring to the Department staff as well. Access to sensitive records shall only be allowed if council approval is given. The only time approval is allowed is 1) where the Department needs to review the record to protect the burial site from harm or to notify lineal descendants that the harm might occur or 2) to evaluate ethnicity.

Page 300-19, Section 13-300-31 Burial site identification; ethnicity evaluation: This section was revised in a major way. There are two ways that burial sites can be identified. The first way is through oral history or written testimony. Since the program began, the main way that burials were being identified is by actually digging them up and there was a lot of concern in the testimonies that we should not have to disturb them in order to protect them. The initial concern was how are you going to guarantee the integrity of the oral information. Our response was that the council will judge the credibility of the oral or written information. If someone says that there are burials there, they would either submit a statement or come to the council, and the council being representatives of the community who knows of that persons family or know the area, they then judge the credibility of the statements. If the council believes the oral testimony and believes it to be sufficient, they will recommend that the testimony be accepted and that this site be identified as a Hawaiian burial site. That recommendation then goes to the Department who will have last say on this matter. If a burial site is recognized by the council, and the Department agrees with the council, that burial will be considered previously identified. This means if someone wants to move it, it has to come before the burial council.

The second way that burial sites are identified is through an archaeological inventory, which means that they are actually dug up. During the archaeological survey, a lot of times, they will not excavate a site, they will look at it and say that it looks like a possible burial. The way it was done before, was if it was a possible burial, after the survey is done, the next step is mitigation. If during mitigation they confirm that it is a burial, it is treated

as an inadvertent. What was done here was if it is a possible burial site and it is confirmed during data recovery, it is the jurisdiction of the council as previously identified.

Next, the Department has to develop a statewide inventory of all burial sites in Hawaii which is done by the following 1) consult knowledgeable persons, 2) acquire authorization from the landowners, 3) inspect and document the site, 4) place the information on the inventory, and 5) provide written notification to the landowner of burial site documentation. The Department will look at their own records and extrapolate all this information and place it on the inventory. The information that is placed on this inventory is extensive and some family members might feel that it is insensitive to do that. Where known lineal descendants disagrees with the recording of information about a burial site that they descended from, they can object to the placement of it in the statewide inventory. If that happens, the only information the State will maintain about the burial is the tax map key, so we know what property the burial is on.

In the first draft, there was a presumption that burials that were found were Hawaiian and a lot of people did not agree with that. What was done was a three tier approach was created to evaluating ethnicity. The first level of inquiry is to evaluate oral or written evidence which is evaluated by a Department cultural specialist. What is being reviewed is any evidence of histories and traditions associated with specific places and families, and also genealogies. This is to try to answer the question, "Are these remains Hawaiian?" The standard that the evidence has to prove whether or not these remains are Hawaiian is reasonable belief. If someone submits oral information and the Department cultural specialist reviews it and says that the evidence is not clear enough, the next level of inquiry is archaeological. This evaluation is done by Department archaeological staff. The archaeologist will look at things such as 1) the burial features, burial goods, 2) whether the layer that they were found in that is associated with the burial is old, and 3) radio carbon dates associated with that site. If by looking at the archaeological evidence, and it establishes ethnicity by reasonable belief, then the evaluation ends, with the iwi still in the ground. If it does not establish ethnicity, the third step is osteological examination. If the osteological evidence cannot determine ethnicity then the treatment shall be determined by the Department.

What happens if someone has a burial site on their property and they want to leave it in place. The law requires that there is some kind of evaluation whether the remains are Hawaiian or not. The Department will review the oral or written testimony to try to establish ethnicity. If they cannot, the next step is to review archaeological existing evidence from any burial sites

or any sites in that area. If that evidence helps to establish that the remains are Hawaiian, then the burial is previously identified Native Hawaiian, it goes to the burial council for treatment. If the information determines that the remains are previously identified non Native Hawaiian, it goes to the Department for treatment as ethnicity unknown. So if the owner says they want to preserve the burial in place, it will not be dug up.

Physical examination methods is limited to observation of metric, non-metric or other relevant traits to suggest ethnicity. X-ray, radio carbon dating and DNA analysis is prohibited unless there is a written request made to the department and the department grants it. Physical examination has to be conducted at a location that the department approves.

Page 300-28, Section 13-300-34 Request for department determination to preserve or relocate non Native Hawaii burial sites: This section was added in because we did not have a section dealing with the determination of non Native Hawaiian burial sites over 50 years old.

Page 300-31, Section 13-300-35 Recognition of lineal and cultural descendants: This section was also changed in a major way. This is the process that the department will follow when lineal descent claims are evaluated. The Department shall review all information that is submitted and assess whether direct or collateral genealogical connections can be demonstrated. The Department will go the State archives, State Bureau of Conveyances, Department of Health, and Family History Centers to verify information that is submitted. Within thirty days from receipt of the information the Department will review and assess the information and submit a written statement that summarizes the information and recommends to the council whether to recognize this person as a descendant. The council reviews the information and votes on whether to recognize this person as a descendant. If the council says yes, the person has standing as a known lineal descendant. The council has to give preference to the feelings of known lineal descendants. With regard to non Hawaiian remains, the department reviews the genealogy.

In cases where someone submits information, and it is not sufficient enough to demonstrate that they are lineally connected to that person, but it does show that their ancestors are buried in the same *ahupua'a*, the council can then recommend to recognize this person as a cultural descendant. The written assessment that the council will receive is that the Department recommends recognition as a cultural descendant. The council then decides whether or not to recognize them. A cultural descendant does not have as much weight on the testimony as a lineal descendant has. At no time can the Department recommend that a person not be recognized as descendant.

All we can say is that the information was insufficient to demonstrate ethnicity.

Page 300-33, Section 13-300-36 Criteria for evaluating request to preserve or relocate Native Hawaiian burial sites: This is the criteria that the council has to follow when they decide to preserve a burial in place. The first section deals with the criteria and the second section deals with the issues that the council has to consider when making its decision.

Page 300-35, Section 13-300-38 Council determinations: When the council makes a determination on whether to preserve a burial site in place or relocate it, the council must do the following 1) fully consider all provisions of burial treatment plan, 2) weigh all other written and oral evidence and assess the credibility of witnesses, 3) carefully consider and apply the preservation criteria, 4) consider any other relevant factors and, 5) render a decision. Within ten days after that decision is made, the Department has to notify the applicant in writing stating what the council decided and why. The applicant then has the choice to request a reconsideration if they disagree and can only be granted if the applicant has information that was not available to the council when they decided. The council decides whether or not to reconsider their own decision. The applicant also can appeal the decision. Within ninety days of the council determination, if the decision was to preserve in place, the Department has to approve a preservation plan. If the council decision was to relocate, the Department has to approve an archaeological data recovery plan dealing with the treatment of the burial. All council determinations to preserve in place or relocate, will be recorded in the Bureau of Conveyances because often times when land is sold there is not disclosure about the existence of burial sites. If an owner did not have notice of the burial, even though the council made a decision on it, they may argue that they have the right to get a new council determination. By recording the decision with the Bureau anyone who wants to buy that property will be put on notice that there are burial sites there. The information that will be recorded with the Bureau does not show exactly where the burial site is, all it will say is that there is an identified burial site or burial sites on the property.

Page 300-44, Section 13-300-41 Private possession of human remains: This sections states that private possession of human remains is prohibited with the following exceptions; 1) when an archaeological firm has remains until they are reburied, 2) where a person is able to establish lineal descent, 3) when the possession is an ethnically acceptable practice and 4) human remains that have been manufactured into artifacts prehistorically. There is a two year period for people to turn in remains to the Department without any penalty.

Ayau said that these were the main sections that was revised. Akutagawa said it looks okay.

Akutagawa asked Ayau what happened in the Yagi case. Ayau said it is still going on. Ayau said that same attorney filed a declaratory action which is a motion to have the court declare that the actions that the councils have taken in the past five years are void because the rules were not passed. Akutagawa asked if it would affect cases like the Ellen Osborne case. Ayau said no.

Ayau said the perspective we had to take was how can we draft something that allows us to best defend council actions in a court of law.

B. Case Updates and Notice of Inadvertent Discovery:

Information/Recommendation: status of ongoing burial cases, completed reinterments, and any necessary follow up by SHPD including Mo'omomi - Nā Iwi Po'o. In addition, notification of any recent inadvertent discovery of human remains.

None.

IV. ANNOUNCEMENTS

None

V. ADJOURNMENT

The meeting was adjourned at 3:00 p.m.

Respectfully submitted,



Joann Kapeliela